No. 92-1541

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In the Supreme Court of the United States

OCTOBER TERM, 1992

LILLIAN MCCOVEY SHERMOEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly dismissed this action seeking a declaration that the Hoopa-Yurok Settlement Act, 25 U.S.C. 1300i *et seq.*, is unconstitutional, on the ground that the Hoopa and Yurok Tribes were indispensable parties under Fed. R. Civ. P. 19.

2. Whether the lower courts erred in concluding that principles of sovereign immunity prohibited joinder of the councils and council members of the two absent Tribes as defendants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 982 F.2d 1312. The opinion of the district court (Pet. App. 17a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1992. The petition for a writ of certiorari was filed on March 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents an action by 70 individual Indians and a small community of Indians claiming that Congress violated the Constitution when it enacted the Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (1988) (codified at 25 U.S.C. 1300i *et seq.* (1988)), to resolve a long-standing dispute between the Hoopa Valley Tribe and a group of Yurok Indians. The district court dismissed the action based on its view that the Hoopa Valley and Yurok Tribes were indispensable parties. Pet. App. 17a-28a. The court of appeals affirmed. Pet. App. 1a-15a.

1. In 1853, Congress authorized the President "to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes." Act of Mar. 3, 1853, ch. 104, §1, 10 Stat. 238. Acting under that statute (as amended by the Act of Mar. 3, 1855, ch. 204, § 1, 10 Stat. 699), President Pierce issued an Executive Order on November 16, 1855, which created a reservation consisting of a 25,000-acre "strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River." See 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 817 (2d ed. 1904) [hereinafter Kappler]. That reservation generally was inhabited by Yurok Indians. See *Short* v. *United States*, 486 F.2d 561, 562 (Ct. Cl. 1973) (*Short I*), cert. denied, 416 U.S. 961 (1974); S. Rep. No. 564, 100th Cong., 2d Sess. 3-4 (1988).

Because the area experienced continuing unrest arising out of the refusal of many of the Indians in the area to move onto the Klamath River Reservation, Congress passed another statute in 1864, authorizing

the President to "set apart * * * at his discretion, not exceeding four tracts of land, within the limits of [California], to be retained by the United States for the purposes of Indian reservations." Act of Apr. 8, 1864, ch. 48, § 2, 13 Stat. 40. Acting under the 1864 Act, President Grant issued a June 23, 1876, Executive Order setting aside a reservation consisting of a 12-mile square tract of land on the last reach of the Trinity River before it joins the Klamath River. Most of the inhabitants of that area—known as the Square—were Hoopa Indians. See 1 Kappler, *supra*, at 815; *Short I*, 486 F.2d at 562; S. Rep. No. 564, *supra*, at 5-6.

Because the relation between the five reservations authorized by the 1853 Act (under which the Klamath River Reservation was created) and the four reservations authorized by the 1864 Act (under which the Hoopa Valley Reservation was created) was unclear, considerable doubt arose as to the continuing existence of the Klamath River Reservation. After a federal district court held in 1888 that the area within the Klamath River Reservation was not Indian country, President Harrison responded by issuing an Executive Order on October 16, 1891, which expanded the Hoopa Valley Reservation to include the tract formerly designated as the Klamath River Reservation (referred to now as the Addition), together with a strip connecting the two tracts of land. See Pet. App. 5a; 1 Kappler, *supra*, at 815; S. Rep. No. 564, *supra*, at 6-7. Although the position of individual officials of the Bureau of Indian Affairs (BIA) in the Department of the Interior may have varied somewhat over the years, the BIA consistently took the view after 1952 that the Square was in effect a separate reservation

held for the Hoopa Indians. Accordingly, the considerable revenues generated by the sale of timber located on the Square were used solely for the benefit of the Hoopa Indians. See S. Rep. No. 564, *supra*, at 7-8.

2. In 1963, a group of Indians identifying themselves as Yurok Indians[1] filed an action in the Court of Claims against the United States (*Short* v. *United States*, Ct. Cl. No. 102-63), claiming that as residents of the Hoopa Valley Reservation they were entitled to a share of the revenues from the Square, even if they were not Hoopa Indians and did not reside on the Square. See *Short I*, 486 F.2d at 562. In 1973, the Court of Claims ruled in favor of the *Short* plaintiffs, who by then numbered more than 3,300. *Id.* at 562, 565-568. After that decision, the *Short* litigation continued for many years as the parties sought to resolve various remaining issues, including a determination as to which plaintiffs qualified as "Indians of the Reservation" entitled to a share of the timber revenues that had been generated on the Square. See *Short* v. *United States*, 661 F.2d 150 (Ct. Cl. 1981) (en banc) (*Short II*), cert. denied, 455 U.S. 1034 (1982). Issues relating to the correct amount of damages owing to the *Short* plaintiffs are still pending in the Court of Federal Claims.

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[1] The *Short* plaintiffs are descendants of Yurok Indians who inhabited the area of the Addition aboriginally and since its addition to the Reservation in 1891. See *Short I*, 486 F.2d at 562. The United States has recognized the existence of a Yurok Tribe, based on historic federal dealings with the Indians from whom the *Short* plaintiffs are descended. The Yuroks have not, however, organized into a political or corporate body. See S. Rep. No. 564, *supra*, at 33 (statement of Ross O. Swimmer, Assistant Secretary for Indian Affairs).

In 1980, a group of the *Short* plaintiffs filed another suit against the United States, seeking to enjoin the Department of the Interior from continuing to recognize the Hoopa Valley Tribe as the exclusive governing authority over the trust lands and resources of the Square. *Puzz* v. *United States*, No. C-80-2908 (N.D. Cal.). The district court in *Puzz* generally accepted the reasoning of the Court of Claims in *Short I* and held that no single Tribe had exclusive authority over any part of the Reservation. Accordingly, the court ordered the BIA to assume management of the entire Reservation, limited the Hoopa Valley Tribal Council to an advisory role in Reservation management decisions, and ordered the BIA to develop a process by which the individual Yurok Indians could have input into Reservation management decisions. See S. Rep. No. 564, *supra*, at 9, 14, 33-34.

3. In response to the "confusion and uncertainty * * * existing on the Hoopa Valley Reservation" after the decisions in *Short* and *Puzz*, S. Rep. No. 564, *supra*, at 13, Congress enacted the Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (1988).[2] The Act conditionally provided for the old Hoopa Valley Reservation to be partitioned into two separate Reservations. 25 U.S.C. 1300i-1. One, corresponding to the Square, retains the title "Hoopa Valley Indian Reservation" and is to be held in trust

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[2] The 1988 Act was amended in minor respects by the Act of Oct. 23, 1989, Pub. L. No. 101-121, § 315, 103 Stat. 744, and the Act of May 24, 1990, Pub. L. No. 101-301, § 9, 104 Stat. 210-211. For convenience, references to the Act are to the 1988 Act, as amended, which is codified at 25 U.S.C. 1300i *et seq.* (1988 & Supp. III 1991).

by the United States exclusively for the benefit of the Hoopa Valley Tribe. 25 U.S.C. 1300i-1(b). The other, designated the "Yurok Reservation," generally corresponds to the "Addition" and is set aside exclusively for the benefit of the Yurok Tribe. 25 U.S.C. 1300i-1(c).[3] Under the Act, the partitioning would take effect only if the Hoopa Valley Tribe promptly waived any claims it might make against the United States under the Act. 25 U.S.C. 1300i-1(a)(2)(A). When that waiver was forthcoming, see 53 Fed. Reg. 49,361 (1988), the Hoopa Valley Tribe became the exclusive local governing authority on the Reservation; in 25 U.S.C. 1300i-7, Congress ratified the governing documents of the Hoopa Valley Tribe.

Because the Yurok Tribe had not previously organized, the Act provides a more complicated process for implementation of the Act on the Yurok Reservation. That process began with appointment by the Secretary of the Transition Team, which was authorized to counsel potential tribal members about the Act and set the stage for further organization. 25 U.S.C. 1300i-8(a)(3) (Supp. III 1991). The Act then provided for creation of an Interim Council, elected by those individuals included on a roll established by the Secretary who elected under the Act to be compensated as members of the Yurok Tribe. 25

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[3] The Act excludes from the Yurok Reservation a small portion of the Addition called the Resighini Rancheria, which is inhabited by petitioner Coast Indian Community of Yurok Indians. 25 U.S.C. 1300i-1(c)(1), 1300i-10(b). The Act authorized the Coast Indian Community to merge its government and territory with those of the Yurok Tribe by a vote to be held within 90 days of the Act's passage. 25 U.S.C. 1300i-10(b). The Department of the Interior has informed us that the Coast Indian Community did not exercise that option.

U.S.C. 1300i-8(b), (c); see pages 7-8, *infra*. The Interim Council is obligated to prepare a tribal constitution for approval by the Secretary and by the vote of tribal members, 25 U.S.C. 1300i-8(d)(4), and is empowered to adopt on behalf of the Yurok Tribe a waiver of claims against the United States arising out of the Act, 25 U.S.C. 1300i-8(d)(2)(i). When the Interim Council adopts such a waiver, the Yurok Tribe's status as an Indian tribe will be ratified and confirmed. 25 U.S.C. 1300i-8(a)(1). The Interim Council will be dissolved when a permanent governing body is elected pursuant to the constitution, or at the end of two years after installation of the Interim Council, whichever occurs first. 25 U.S.C. 1300i-8(d)(5).[4]

The Act also creates a Settlement Fund totalling approximately $75 million, made up of about $65 million in revenues derived from the trust lands of the pre-Act Hoopa Valley Reservation (primarily timber revenues from the Square) that have been held in various escrow accounts by the Secretary, together with an additional appropriation of $10 million. 25 U.S.C. 1300i-3; S. Rep. No. 564, *supra*, at 19-21.[5] The actual distribution of the Settlement Fund depends on the number of individuals listed on a Settlement Roll prepared by the Secretary. 25 U.S.C. 1300i-4 (1988 & Supp. III 1991). Those individuals may select from

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[4] The Department of the Interior has informed us that the Interim Council has been elected, but that the Council has not yet adopted a waiver of claims or presented a constitution to the Secretary for approval.

[5] The Settlement Fund does not include the funds at issue in the *Short* litigation in the Court of Federal Claims; the Act preserves the right of the *Short* plaintiffs to litigate that case to judgment. 25 U.S.C. 1300i-2.

among three options available under the Act. First, individuals eligible for membership in the Hoopa Valley Tribe may elect to become members of the Hoopa Valley Tribe; in that event, they will share only in a portion of the Fund distributed to the Hoopa Valley Tribe itself, to be determined by comparing the size of the Hoopa Valley Tribe to the whole number of Indians eligible for distributions under the Act. 25 U.S.C. 1300i-3(c), 1300i-5(b). Second, individuals on the Settlement Roll may elect to become members of the Yurok Tribe, in which case they will receive between $5,000 and $7,500, depending on their age. 25 U.S.C. 1300i-3(d), 1300i-5(c). Third, individuals on the Settlement Roll may elect membership in neither Tribe, in which case they will receive $15,000. 25 U.S.C. 1300i-5(d). By making an election to receive payment under any of the three options, an individual waives all right and interest in the reservation or other property of the Tribe (or Tribes) he has chosen not to join. 25 U.S.C. 1300i-5(b)(4), (c)(4) and (d)(3). Any remaining funds are then to be disbursed to the Yurok Tribe. 25 U.S.C. 1300i-6(a).[6]

Finally, the Act provides that "[a]ny claim challenging the partition of the joint reservation * * * as having effected a taking under the fifth amendment of the United States Constitution or as otherwise

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[6] The Secretary completed the Settlement Roll, determining which individuals were eligible for distributions, in the spring of 1991. 56 Fed. Reg. 12,062 (1991). The elections have been made and payments have been made to the Hoopa Valley Tribe and to the individuals who selected membership in the Yurok Tribe or in neither Tribe. The Secretary has not yet made the disbursement of the remaining funds to the Yurok Tribe because it has not yet adopted the requisite waiver of claims against the United States. See p. 7 & note 4, *supra*.

having provided inadequate compensation shall be brought * * * in the United States Claims Court." 25 U.S.C. 1300i-11(a) (Supp. III 1991). As petitioners note (Pet. 6 n.4), claims for compensation have been filed in the Court of Federal Claims (formerly the Claims Court) by the Yurok Tribe, which sued on behalf of itself and its members, *Yurok Tribe* v. *United States*, No. 92-173L, and by individual plaintiffs, including the individual petitioners in this case, *Ammon* v. *United States*, No. 91-1432L.

4. In 1990, petitioners filed this action in the United States District Court for the Northern District of California. They contended that the Act unconstitutionally infringed their right freely to associate in matters of political concern, violated their rights under the Due Process and Just Compensation Clauses and the equal protection guarantee of the Fifth Amendment, and exceeded constitutional limits on Congress's power to regulate Indian affairs. See Pet. App. 6a. Petitioners sought injunctive relief preventing the Secretary from implementing the Act and from treating the former Reservation as other than a single, unified reservation. Four individual members of the Hoopa Valley Tribal Council intervened and filed an answer. See *id.* at 7a. In 1991, the district court dismissed the action with prejudice, concluding that the Hoopa Valley and Yurok Tribes were indispensable parties under Federal Rule of Civil Procedure 19(b). Pet. App. 17a-28a.

Petitioners subsequently sought leave to file a second amended complaint naming the Yurok Tribe, the Yurok Interim Council, and all eight members of the Hoopa Valley Tribal Council as defendants. The court denied that motion on July 10, 1991 (Pet. App.

29a-31a), explaining that the "whole purpose of the lawsuit appears to be to invalidate the Hoopa-Yurok Settlement Act, and this just isn't the way to go about it." *Id.* at 30a.

5. The court of appeals affirmed. Pet. App. 1a-15a. The court first concluded that the Tribes were "necessary" parties to the suit because they have a "legally protected interest in the outcome of this action." *Id.* at 8a-9a. The court rejected petitioners' argument that the Tribes' interests would be represented adequately by the United States, noting that conflicts of interest could arise from the United States' status as trustee for all the various Indians in the controversy. *Id.* at 9a-10a. The court also rejected the notion that four members of the Hoopa Valley Tribal Council who had intervened could adequately represent either Tribe. The Court noted that their interests are entirely adverse to those of the Yurok Tribe, and that their interests differed from those of the Hoopa Valley Tribe because the Act "affects the rights of the intervenors as individuals." *Id.* at 10a-11a.

The court of appeals then concluded that the absent Tribes were indispensable parties, requiring dismissal of the complaint under Rule 19(b). The court explained that the potential prejudice to the absent Tribes, including threats to their legal entitlements under the Act and to their sovereignty, outweighed the prejudice to petitioners from dismissal. Pet. App. 11a-12a.

Finally, the court affirmed the denial of petitioners' motion to amend their complaint to join the officers of the Hoopa Valley Tribal Council as defendants. Pet. App. 12a-15a. The court explained that the district

court's ruling on that point was correct because even if the individuals had been joined, the sovereign immunity of the Tribe would have required dismissal. *Id.* at 13a. Relying on this Court's decision in *Dugan* v. *Rank*, 372 U.S. 609 (1963), the court of appeals concluded that this is an instance in which a suit for injunctive relief against individual officers may not proceed, because the suit in effect is one against the Tribe themselves, see Pet. App. 13a (quoting *Dugan*, 372 U.S. at 620), inasmuch as the relief requested would "require affirmative action by the sovereign or the disposition of unquestionably sovereign property," Pet. App. 14a (quoting *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949)).

ARGUMENT

1. Petitioners contend (Pet. 8-9, 14-19) that the lower courts erred in concluding that the action could not proceed in the absence of the Tribes under Rule 19, Fed. R. Civ. P. Although petitioners argue (Pet. 9) that the decision below constitutes a sweeping ruling that generally would bar judicial review of statutes that "only marginally * * * benefit a tribe," the opinion of the court of appeals makes clear that its ruling rests on an analysis of the vital interests actually at stake for the Tribes in this particular case. As the Court explained in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968), "[w]hether a person is indispensable * * * can only be determined in the context of particular litigation," and that "decision must be made on the basis of practical considerations," because "[t]here is no prescribed formula for determining in every case whether a person * * * is an indispensable party." *Id.*

at 117-118 & nn. 12, 14 (internal quotation marks omitted). The resolution of that fact-specific question in this case does not raise an issue of general interest warranting review by this Court. In any event, the lower courts correctly determined that the Tribes were both "indispensable" parties under Rule 19(b).

a. Petitioners do not seriously dispute the lower courts' conclusion that the Tribes were necessary parties under Rule 19(a)(2)(i) because each of them "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect that interest." The Tribes' most fundamental interests are subject to complete divestment in this litigation challenging the Act. For example, the Act grants the Yurok Tribe authority to organize and provides for express congressional confirmation and ratification once organization is complete; as for the Hoopa Valley Tribe, the Act resolves the uncertainty created by *Short* and *Puzz* by granting to the Hoopa Valley Tribe (as it does to the Yurok Tribe) the exclusive beneficial ownership of a clearly defined territory and the exclusive sovereign authority to govern that territory. As discussed above, the Act also creates a $75 million Settlement Fund, a majority of which the Act allocates to the two Tribes—and $25 million of which already has been disbursed to the Hoopa Valley Tribe. The Act also provides for the transfer to the United States in trust for the Yurok Tribe of all National Forest lands within the boundaries of the newly formed Yurok Reservation, 25 U.S.C. 1300i-1(c)(2)(A), and authorizes the appropriation of $5 million for the acquisition of additional

reservation lands for the Yurok Tribe, 25 U.S.C. 1300i-1(c)(3)(B). This suit—which seeks to invalidate the Act and return the situation to the status quo existing before the Act's passage—unquestionably has the potential to impair those vital interests.

As several courts of appeals have explained in the Indian context, when a party deemed to be "necessary" under Rule 19(a) is immune from suit, "there is very little room for balancing of other factors." *Enterprise Management Consultants, Inc.* v. *United States*, 883 F.2d 890, 894 (10th Cir. 1989); see *Fluent* v. *Salamanca Indian Lease Authority*, 928 F.2d 542, 548 (2d Cir.) (very little room for balancing when dismissal "turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent") (internal quotation marks omitted), cert. denied, 112 S. Ct. 74 (1991); *Wichita and Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986); 3A James Wm. Moore and Jo Desha Lucas, *Moore's Federal Practice* ¶ 19.15, at 19-266 n.6 (2d ed. 1993). Accordingly, given the particularly grave interests at stake for the Tribes, it would have been inappropriate for the lower courts to proceed absent the most weighty countervailing considerations. Because the arguments advanced by petitioners are not sufficient to overcome the Tribes' interests in participating in a determination of their own destiny, the lower courts correctly dismissed this suit.

In particular, we note that petitioners err in suggesting (Pet. 9) that the decision of the court of appeals leaves them entirely without judicial recourse. As the district court noted, the Act itself provides an important alternative remedy in the form

of an action in the Court of Federal Claims for monetary relief for an alleged taking of petitioners' property. Pet. App. 26a n.4 (citing 25 U.S.C. 1300i-11(a) (Supp. III 1991)); see *Heller, Ehrman, White & MacAuliffe* v. *Babbitt*, Nos. 92-5003 & 92-5004 (D.C. Cir. May 18, 1993), slip op. 2-3 ("The [Court of Federal Claims] has exclusive jurisdiction over all suits challenging the distribution of money and property under * * * [the Hoopa-Yurok Settlement Act]. [A]n eager litigant may not circumvent a congressional grant of exclusive jurisdiction to the [Court of Federal Claims] * * * by simply converting the suit into one for injunctive relief.").

The Act thus fully protects petitioners' core personal interests by preserving petitioners' ability to vindicate whatever property right they may have in a suit for compensation, irrespective of the absence of the Tribes as parties to such a suit. The other interests asserted by petitioners simply boil down to their disagreement with Congress's chosen method of bringing about a prospective resolution of the complex and long-standing problems on the Hoopa Valley Reservation by partitioning that Reservation according to its historical use, providing for separate tribal governments, and according eligible Indians in the position of the individual petitioners in this case an option to cast their lot with one Tribe or the other—or neither. Given Congress's plenary power over Indian affairs, including recognition of tribal governments (see *Baker* v. *Carr*, 369 U.S. 186, 215-216 (1962)) and questions of tribal membership for federal purposes (see *Delaware Tribe Business Committee* v. *Weeks*, 430 U.S. 96 (1977))—and given the provision for independent judicial review in the Court of

Federal Claims insofar as petitioners' property rights are concerned—there is nothing anomalous about dismissal of petitioners' challenge because of the absence of the affected Tribes themselves as parties.

b. Petitioners nevertheless contend (Pet. 16-18) that the lower courts erred in concluding that the United States could not adequately address the interests of the absent Tribes. That argument fails. The Tribes' interests in their organization and sovereignty are of such significant import to the Tribes that it would not be appropriate to adjudicate those interests in a case to which they are not parties. As the Tenth Circuit has explained, each absent Tribe has an interest in preserving "its sovereign right not to have its legal duties judicially determined without consent"—"an interest which the United States' presence in this suit cannot protect." *Enterprise Management Consultants, Inc.*, 883 F.2d at 894; see also *Pembina Treaty Committee* v. *Lujan*, 980 F.2d 543, 545-546 (8th Cir. 1992) ("[B]ecause the tribe would have to abide by any process [resulting from the lawsuit,] * * * [t]he tribe obviously has an interest in what that process is, and that interest will not be protected by any other person already a party.").

Furthermore, even if it would be appropriate in certain circumstances for the United States to protect interests like those at stake here, the lower courts did not err in concluding that in this case the United States would not adequately represent the interests of the absent Tribes because of its potentially conflicting obligations to those Tribes and to the individuals involved in this dispute. See Pet. App.

9a-10a; cf. Pet. 16 n.12 (acknowledging that there "[o]bviously * * * is a conflict between petitioners and the United States—petitioners are suing the United States"). To be sure, the United States might not be subject to suit for a breach of its duties simply because it acted in a situation in which it had conflicting interests. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 127-128 (1983). But the question here is whether it would be fair to the Tribes to proceed in their absence to adjudicate the constitutionality of an Act of Congress granting them sovereignty over their Reservations, based on the view that the United States would represent their interests adequately. In that situation, the decision of the lower courts that the conflicting obligations would prevent the United States from being an adequate representative is entirely reasonable. Petitioners offer no basis for supposing that any other court of appeals would have decided the question differently.[7] Accordingly, that ruling below does not merit review by this Court.[8]

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[7] The only case cited in the relevant portion of the petition, *United States* v. *Mitchell*, 463 U.S. 206 (1983) (cited at Pet. 17), stated that the duties of the federal government towards Indians derive from particular statutes and regulations, rather than a general duty. The case did not involve the question of indispensable parties, and it did not suggest that Indians could not fairly view the United States as operating under a conflict of interest if it attempted to represent the interests of Indian tribes and individuals who had differing views on a particular issue.

[8] Petitioners also err in relying (Pet. 18-19) on the capacity of the four Hoopa tribal officers to represent the absent Tribes. The district court found it "quite clear" that those individuals were "appearing in their individual capacities and not as representatives of the tribe." Pet. App. 21a n.3. Referring to

c. Petitioners also contend (Pet. 14-16) that the lower courts erred in concluding that the "public rights" exception to normal joinder rules should have allowed the suit to proceed. We disagree. The so-called public rights exception arises from this Court's decision in *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350 (1940), which allowed the National Labor Relations Board to enforce an order requiring an employer to desist from unfair labor practices, even though the order might have prejudiced the rights of employees not joined in the proceeding who had contracts with the employer. *Id.* at 359-367. The Court explained that because the "proceeding [was] so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id.* at 363. The Court noted that the issues in dispute between the Board and the employer were not legally related to the rights asserted by the employees, *id.* at 364, and that the Board's order would "not foreclose the employees from taking any action to secure an adjudication upon the contracts,

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the indirect monetary benefits available to the intervenors under the Act—which might give them an interest distinct from the interests of their Tribe—the court of appeals determined that it could not "with any certainty conclude that the intervenors would be willing to make all of the arguments of the absent tribe." *Id.* at 11a. That conclusion does not warrant review, particularly in the absence of any suggestion that the four individual Hoopas would be adequate representatives of the absent Yurok Tribe. We discern no basis for petitioners' statement (Pet. 17 n.13) that the Yurok Tribe was unfairly denied an opportunity to participate in this litigation; at no time did that Tribe formally attempt to intervene in this case.

nor prejudge their rights in the event of such adjudication," *id.* at 365.

That analysis is entirely inapplicable here. In *National Licorice*, the NLRB sought to enforce an Act of Congress, and thus to give effect to the rights created by that Act. In this case, by contrast, petitioners attack an Act of Congress, and attempt to prevent effectuation of the important public rights that Congress recognized and established in the Hoopa Valley and Yurok Tribes and their respective members. Moreover, in this case, unlike *National Licorice*, the legal entitlements of the Tribes that would be affected adversely are precisely the same as the entitlements petitioners challenge in this case—namely, the entitlements of the Tribes to own and govern their separate reservations under the terms of the Act. For that reason, disposition of this litigation, unlike *National Licorice*, could directly deprive the absent parties of their interests in a way inconsistent with the principles embodied in Rule 19. As the Ninth Circuit explained, "the public rights exception to joinder rules is an acceptable intrusion upon the rights of absent parties only insofar as the adjudication does not destroy the legal entitlements of the absent parties." Pet. App. 12a (brackets and internal quotation marks omitted). Neither of the cases cited by petitioners (Pet. 15-16) rejects that analysis,[9] and petitioners do not suggest that any

[9] Both of those cases restated the rule of *National Licorice* that when litigation seeks the vindication of a public right, third persons who could be adversely affected by a decision favorable to the plaintiff would not thereby become indispensable parties. See *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 424 (2d Cir. 1975), cert.

other court has considered application of the public rights exception to issues of tribal sovereignty like those involved here. The question therefore does not merit review by this Court.

2. Finally, petitioners contend (Pet. 10-14) that the lower courts erred in concluding that a suit against the members of the Hoopa Valley Tribal Council would be barred by principles of sovereign immunity. In particular, petitioners contend (Pet. 10-11) that the court of appeals adopted a broad "exception" to the normal rule allowing suits for equitable relief against government officials to bar any such action brought against a tribal official. Petitioners misapprehend the nature of the decision of the court of appeals.

As petitioners note, federal courts traditionally have allowed suits seeking injunctive relief against state officials alleged to be acting under an unconstitutional state statute. *Ex parte Young*, 209 U.S. 123 (1908). Those suits proceed on the theory that an unconstitutional statute is void and thus does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985) (quoting *Ex parte Young*, 209 U.S. at 160). That theory does not, however, allow a plaintiff to circumvent principles of sovereign immunity by suing an officer where the relief sought in the lawsuit inevitably runs against the sovereign itself. As the Court explained in

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denied, 429 U.S. 823 (1976); *Jeffries* v. *Georgia Residential Finance Authority*, 678 F.2d 919, 929 (11th Cir.), cert. denied, 459 U.S. 971 (1982). Neither court suggested that there are no circumstances in which the rights of the absent party are so closely related to the issues addressed in the suit that it would be unfair to proceed without the absent party.

Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949),

> a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

Id. at 691 n.11.

Contrary to petitioners' submission (Pet. 10-12 & n.10), the decision of the court of appeals plainly rested on its analysis of *Larson*, rather than some general notion that *Ex parte Young* does not apply in suits against tribal officers. See Pet. App. 13a-14a (quoting *Larson*, 337 U.S. at 691 n.11, 704). The court's reference to an "intolerable burden" on the tribal government, which petitioners find objectionable (see Pet. 11-12), only identifies the circumstances in which an injunction against an officer will be deemed to "require affirmative action by the sovereign" sufficient to extend the immunity of the sovereign to the suit against its officer. See Pet. App. 14a (noting that "the relief sought in this case would prevent the absent tribes from exercising sovereignty over the reservations allotted to them by Congress," and commenting that "[i]t is difficult to imagine a more intolerable burden on governmental functions") (internal quotation marks omitted).[10]

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[10] The "intolerable burden" formulation was first articulated by the Ninth Circuit in *Washington* v. *Udall*, 417 F.2d 1310, 1318 (1969). Although petitioner does not mention it, two other

The court of appeals acted reasonably in determining that the *Larson* rule barred the suit in this case. The primary relief requested was an injunction "[b]arring [respondents] from subjecting [petitioners] to any practice which treats the joint reservation otherwise than as a single, unified reservation in which every Indian of the reservation alike is entitled to use and benefit from, and to participate in the administration of, reservation lands, resources, and funds in a nondiscriminatory manner." Second Amended Complaint at ¶ 71(b), C.A. E.R. Tab 108, at 66. That relief would go far beyond ordering the cessation of allegedly unconstitutional conduct, because it would commit the Hoopa Valley Tribe to a single course of action, affirmatively requiring it to exercise its sovereign power and to govern its reservation in the particular manner requested by petitioners. Principles of sovereign immunity do not permit petitioners to accomplish such a fundamental restructuring of the Tribe and its territorial sovereignty by the indirect method of suing officials rather than the immune Tribe itself.[11]

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circuits have used the same formulation. See *Clark* v. *United States*, 691 F.2d 837, 840 (7th Cir. 1982) (citing *Udall*); *Saine* v. *Hospital Authority*, 502 F.2d 1033, 1037 (5th Cir. 1974) ("We believe the approach outlined in *Udall* is a sound and workable one.").

[11] See *Morrison* v. *Work*, 266 U.S. 481, 485-486 (1925) (suit against federal officials claiming unconstitutional deprivation of property barred by sovereign immunity because "[t]o interfere with [the United States'] management and disposition of the lands or the funds by enjoining its officials, would interfere with the performance of governmental functions and vitally affect interests of the United States"); *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963) (sovereign immunity barred suit

The cases cited by petitioners (Pet. 13) involved only the broader question of whether *Ex parte Young* applies to tribal officials at all, a question the court of appeals answered in petitioners' favor. See Pet. App. 13a-14a. Accordingly, there is no basis for assuming that any other court of appeals would have resolved the immunity question differently on the facts of this unusual case. Hence, the question does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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against federal official challenging decisions regarding disposition of lands pursuant to Hawaii Statehood Act); see also *Dugan* v. *Rank*, 372 U.S. 609, 621 (1963) (sovereign immunity barred suit against federal official where suit would "interfere with the public administration").